(*d*) where any penalty prescribed by this section does not exceed one thousand dollars, the Commissioner may reduce or remit such penalty."

It is contended on behalf of the Plaintiffs that this section applies to bills of exchange drawn out of the Colony and that the bills in the present case have therefore been properly stamped by the Commissioner. I have to reject this contention for two reasons. In the first place the section commences with the words—

"Save where other express provision is made by this or any other Ordinance"

and, as I have pointed out above, express provision regarding bills of exchange drawn out of the Colony is in fact made by section 40. In the second place, if section 43 were to apply to bills of exchange drawn out of the Colony then, under paragraph (a) of the section, they would be stampable within thirty days after receipt in the Colony; but this would be in direct conflict with the provisions of section 39 which, as I have already stated, excludes bills of exchange from the general provision which enables instruments executed out of the Colony to be stamped within that period. And if bills of exchange drawn out of the Colony are excluded from the provisions of paragraph (a) of section 43, then in my view they are necessarily excluded from the provisions of paragraphs (b) and (c) also. I think it is clear that paragraphs (b) and (c) of the section apply only to those instruments to which paragraph (a) applies, and the words "the instrument" have the same meaning in all three paragraphs (a), (b) and (c).

For these reasons I am of opinion that the combined effect of sections 39, 40 and 43 is to exclude from the provisions of the last mentioned section bills of exchange drawn out of the Colony, and as the Ordinance contains no other provision for late-stamping such bills I think that the Commissioner was wrong in stamping the bills in the present case.

Then we come to section 49 of the Ordinance which, subject to certain provisos which do not concern us here, provides as follow:—

"49. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, authenticated by any such person or by any public officer, unless such instrument is duly stamped."

It follows from this section that before a Court can admit in evidence an instrument chargeable with duty it must be satisfied that the instrument is duly stamped. (See Judgment of Parsons, J. in *Jethibai* v. *Ramachandra Narottam*, 13 Bombay 484).

The expression "duly stamped" is defined as follows in section 2 of the Ordinance:—

"Duly stamped," as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the Colony.

According to this definition an instrument, in order to be duly stamped, must be stamped in accordance with the law for the time being in force in the Colony, and I interpret this to mean that the instrument must bear a stamp of the proper value, it must be stamped in the proper manner with the proper description of stamp, and it must have been stamped at or within the time prescribed by law.

In the present case it is admitted that the bills were not stamped prior to acceptance as required by section 40 of the Ordinance and I have already expressed the view that the Ordinance contains no provision enabling bills of exchange drawn out of the Colony to be late-stamped.

It follows, therefore, that in my opinion these bills are not duly stamped within the meaning of section 49 and I am precluded from admitting them in evidence.

In these circumstances the Plaintiffs' claim fails and must be dismissed with costs.

Judgment accordingly.

Solicitors for the Plaintiffs—*Donaldson & Burkinshaw.*

Solicitors for the Defendants—*Aubrey Davies & Co.*

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

August 15, 1933.

[APPELLATE JURISDICTION]

HUGGARD, C. J., THOMAS, C. J. (F.M.S.) & GERAHTY, J.

January 25, 1934.

THE OFFICIAL ASSIGNEE OF THE PROPERTY OF LOH CHUK POH, A BANKRUPT.....Plaintiff-Appellant.

vs.

THE OVERSEA CHINESE BANK LIMITED.....Defendants-Respondents.

Bills of Exchange—cheque for payment of dividend—signed by Colonial Treasurer—countersigned by the Colonial Secretary—further countersigned by the Official Assignee—"true owner"—right to sue—Ordinance No. 44 (Bankruptcy) Ss. 24(4), 73(1); Bills of Exchange Act, 1882, S.82.

A crossed cheque for the purpose of paying a dividend in bankruptcy was fraudulently obtained from the Official Assignee. The cheque was signed by the Colonial Treasurer, countersigned by the Colonial Secretary and further countersigned by the Official Assignee. By means of a forged endorsement the cheque was negotiated and paid. The Official Assignee brought an action against the collecting bank for damages for conversion. The bank

pleaded among other things that the Official Assignee was not the true owner of the cheque inasmuch as he was not the drawer.

Held by the Court of Appeal (Huggard, C. J., Thomas, C. J. (F.M.S.) and Gerahty, J.) upholding in part the decision of Mills, J. that the Official Assignee was not the drawer nor was he in the position of a drawer in the mercantile sense.

Held, nevertheless, that the right to possession of and the property in the cheque were vested in the Official Assignee and that he was therefore entitled to maintain an action for conversion against any person who, however innocently, had obtained possession of the cheque and disposed of the proceeds.

ACTION tried before Mills, J., on the 15th day of August, 1933.

The facts so far as they are material to this report are sufficiently set out in the Judgment below.

Vaux (*Taylor* with him) for the plaintiff.

Eber for the defendants.

Vaux (*Taylor* with him) for the plaintiff. The plaintiff is a statutory person and also a trustee in control of an estate. His duty is to administer the estate according to the law of bankruptcy. He is also subject to Governmental rules of practice appertaining to his office as a statutory person. He indents on the Treasury for cheques. These are sent to him by the Treasury. They are drawn by the Colonial Treasurer or his Deputy on an account kept by the Government. The Official Assignee must countersign (Bankruptcy Rule No. 193). In so far as the Official Assignee countersigns he is the drawer; in so far as the Treasurer is instructed to issue, he is the issuer. In Bankruptcy Rule 193 the word "issue" is used in a different sense from that in which it is used in the Bills of Exchange Act, (see Chalmers, p. 8.) Not having been countersigned the cheque is not complete in form and as such it is not "issued" (as defined in the Bills of Exchange Act). The Official Assignee is the drawer because he completes the drawer's signature. His duty after completing the cheque is to issue it. The person who gives the order is the drawer (Chalmers, p. 10). He must be the person entitled to draw on the Bankruptcy Estates Account. The statutory duty of the Official Assignee as trustee is to procure cheques for persons entitled to dividends. Besides being drawer, he has, as trustee, such an interest in the cheque issued by him and the proceeds thereof as to entitle him to sue alone, as the true owner. *Arnold & others* v. *The Cheque Bank*, 1 C.P.D. 578.

Eber for the defendants. The true owner of a cheque and of its proceeds must be one and the same person. When the cheque passes and is cashed, its true owner is the person who gave value and he is the true owner of the proceeds. The cheque in the case has not been negotiated. The true owner therefore is the person who draws it, by himself or his agent. on an account which belongs to him. The Hongkong & Shanghai Bank keeps the account and one witness says it is a Government account. The cheque, if the endorsement is forged, has never been negotiated. So the true owner of the cheque and the proceeds is the Government of the Straits Settlements. Under section 82 of the Bills of Exchange Act, 1882, the liability is to the true owner of the cheque. The Plaintiff is not the drawer, payee, endorser, or a holder for value, or a bearer. He has no statutory attribute which entitles him to say he is the owner. Mere possession does not make him a holder, cf Chalmers, p. 6. The claim does not allege that the money represented by the cheque belongs to the Official Assignee nor does it state that any money belonging to this Estate is to be found in the Bankruptcy Estates Account. The drawer is the Treasurer. He does not own the cheque or the account. The account is a Government account. The proper course to pursue is to proceed under the Crown Suits Ordinance. The Government should sue by its proper officer. The Official Assignee is not the proper officer. He has not produced any authority to show that he sues as agent of the Government.

Vaux in reply. Bankruptcy Rule 193 requires cheque to be drawn to order, signed by the Colonial Treasurer and countersigned by the Official Assignee and issued to the Official Assignee. The latter is the trustee of the Estate of the bankrupt and of those monies which were a dividend in that estate. The Official Assignee was the true owner of this cheque and has sufficient right to found this suit. Dividends are paid by the Official Assignee not by the Treasurer. "Issued" is a technical word; see Chalmers, p. 8. The cheque is not complete in form till the Official Assignee has countersigned it. In the rule "issued" is used in a non-technical sense. The Treasurer only obeys the mandate of the Official Assignee. It is an administrative rule which brings in the Treasurer at all. The legal property in the money and the cheque vests in the Official Assignee. Owing to the official rules, the Official Assignee must get his cheques in a certain manner. The cheque is a mandate to the Bank. It bears three signatures of which that the Treasurer is a purely administrative signature; so is the Colonial Secretary's signature. The Official Assignee is in the position of a drawer.

Cur. Ad. Vult.

MILLS, J.—The plaintiff, who is the Official Assignee of the property of Loh Chuk Poh, a bankrupt, sues on a cheque for $12,612.13.

The defendant is a Bank, which collected the cheque for a firm called Hock Huat Chan.

The cheque is dated 29th January, 1930, it is made payable to Govindasamy Krishnasamy or Order: it is drawn by N. A. Sedwick, Deputy Treasurer, Straits Settlements, it is stamped "Bankruptcy A/C" it bears the counter-signature of E. E. Colman, Official Assignee, and the coun-

ter-signature of W. Bartley, for Colonial Secretary, Straits Settlements.

The counter-signature of the Official Assignee is required by Rule 193(1) of the Bankruptcy Rules: the counter-signature of the Colonial Secretary or his agent is required by a Government regulation in the case of all cheques over $10,000. The cheque was drawn for the purpose of paying a dividend: the procedure is laid down in Rule 193(1) of the Bankruptcy Rules as follows:—

> "193.—(1) Dividends shall be paid by the Official Assignee by cheque to order drawn on the Bankruptcy Estates Account signed by the Colonial Treasurer and counter-signed by the Official Assignee which shall be issued to the Official Assignee by the Colonial Treasurer on his application."

I find as a fact that the signature of the payee was forged and that the paying Bank credited the defendant with the amount specified in the cheque, i.e., that the defendant received the amount so specified.

The plaintiff now seeks to recover the sum of $12,612.13 on the ground that he is the true owner of the cheque and that the defendant has either converted the cheque or received the proceeds to the use of the plaintiff.

The law on this point has been set out in the case *Arnold and others* v. *The Cheque Bank*, (1 C. P. D. at p. 585) as follows:—"If a person wrongfully convert a bill of exchange and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use."

Among other defences, the defendant alleged that the plaintiff is not the true owner of the cheque and therefore has no *locus standi* to sue.

It is necessary first of all to decide the question, Is the plaintiff the true owner of the cheque?

Plaintiff's Counsel argued that the Official Assignee is true owner because (1) he is the drawer of the cheque, (2) because he is in the position of the drawer (3) because he is the legal owner of the fund on which the cheque is drawn.

Contra, Defendant's Counsel argued that the plaintiff cannot be the true owner because he is not the drawer, payee, endorser, holder or bearer, and possesses no statutory attribute which entitles him to ownership.

The onus, of course, is on the plaintiff.

As to the first argument: it appears to me abundantly clear from the cheque itself that the drawer, i.e. the person who gives the order and signs as such giver, is the Deputy Treasurer and no one else; I hold, therefore, that the Official Assignee is not the drawer of the cheque.

As to the second argument: it is contended that the Official Assignee is the real drawer, and that the Deputy Treasurer is a mere "conduit-pipe". I am unable to accept that contention. the contention, as I understand it, involves, *ab initio*, the proposition that the Bankruptcy Ordinance, or a Rule thereunder, creates the relation of principal and agent between the Official Assignee and the Colonial Treasurer: I hold, however, that there is nothing in the Bankruptcy Ordinance or the Rules thereunder, which creates such a relation; I therefore reject the contention that the Official Assignee, as being in the position of the drawer, is the true owner of the cheque.

As to the third argument: the ownership of the fund on which the cheque is drawn does not appear to me to be relevant; ownership of the cheque does not depend on ownership of the fund; indeed, it may be that there is no fund on which a cheque is drawn, yet it could hardly be contended that such a cheque has no true owner; possibly the law requires the Colonial Treasurer to draw on a fund of which he is not the true owner, but I express no opinion as to the ownership of the fund; I hold that, whether or not the Official Assignee is the owner of the fund, he is not, in the present instance, the true owner of the cheque.

My conclusion being that the Official Assignee is not the true owner of the cheque, it follows that the Official Assignee has no right to bring this suit upon it.

That conclusion being sufficient for the determination of the suit, I refrain from making any further finding on matters of fact or further decisions on matters of law, since such findings and decisions would merely be *obiter dicta*.

Judgment accordingly.

Solicitors for the Plaintiff—*Rodyk & Davidson.*

Solicitors for the Defendants—*Chan & Eber.*

From the above decision of Mills, J. the plaintiff appealed. The appeal came on hearing before Huggard, C. J., Thomas, C. J. (F.M.S.) and Gerahty, J.

Cobbett for the Appellant.

Koek (*Eber* with him) for the Respondents.

Cur. Ad. Vult.

HUGGARD, C. J.—This was an action brought by the Official Assignee of the property of Loh Chuk Poh, a bankrupt, against the Oversea Chinese Bank Limited (now in Voluntary Liquidation) for damages for the conversion of a cheque dated 29th January, 1930, or alternatively, for money had and received by the Defendants to the use of the Plaintiff.

The facts, so far as they are material to the question to be decided on this appeal, may be stated shortly.

On the 29th January, 1930 the Official Assignee received from the Colonial Treasurer a cheque for $12,612.13 drawn on the Hongkong and Shanghai Banking Corporation in favour of one Govindasamy Krishnasamy. The cheque bore the stamp "Bankruptcy Account" and was signed by the Deputy Treasurer and countersigned by the Under Secretary for the Colonial Secretary. The cheque was drawn for the purpose

of paying a dividend in the bankruptcy of Loh Chuk Poh to a creditor Govindasamy Krishnasamy. On receipt of the cheque the Official Assignee also countersigned it in accordance with the requirements of Bankruptcy Rule 193(1).

Subsequently the cheque was handed by the Official Assignee to a person who falsely represented himself to be the payee Govindasamy Krishnasamy, and eventually it found its way to the Defendants, having been handed in by a customer of theirs for collection. The cheque then bore an indorsement purporting to be, but which was not in fact, the signature of Govindasamy Krishnasamy. In due course the Defendants presented the cheque to the Hongkong and Shanghai Banking Corporation for payment. The latter Bank queried the indorsement but eventually honoured the cheque, and the amount which it represented was credited by the Defendants to their customer's account and was later drawn out by him.

On these facts the Plaintiff claimed to be the true owner of the cheque in question and, as such, to be entitled to recover from the Defendants the amount represented by the cheque. The action was tried before Mills, J. and the learned Judge held that the Plaintiff was not the true owner of the cheque and consequently had no right to bring this suit upon it. The learned Judge therefore dismissed the action. From that order the Plaintiff has appealed.

The question for decision is whether in the circumstances of the present case any action is maintainable by the Plaintiff against the Defendants.

It will be convenient at this point to set out the provisions of the Bankruptcy Ordinance and Rules which appear to be relevant to the matter under consideration. They are as follows:—

> Section 24(4) "When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee."
>
> Section 73(1) "An account called the Bankruptcy Estates Account shall be kept with The Treasury in accordance with such rules as the Governor in Council may from time to time prescribe, and all moneys received by the Court in respect of proceedings under the Ordinance shall be paid to that account.
>
> (2) "The Official Assignee shall in such manner and at such times as the Court with the concurrence of the Governor in Council directs pay the money received by him on account of estates in bankruptcy into court to the credit of the Bankruptcy Estates Account and the Court shall furnish him with a certificate of receipt of the money so paid."
>
> Rule 193(1) "Dividends shall be paid by the Official Assignee by cheques to order drawn on the Bankruptcy Estates Account signed by the Colonial Treasurer and countersigned by the Official Assignee which shall be issued to the Official Assignee by the Colonial Treasurer on his application."

What actually happens in practice is this. All moneys received by the Official Assignee in connection with estates in bankruptcy are paid by him direct into an account which is kept by the Colonial Treasurer with the Hongkong and and Shanghai Banking Corporation, and the credit slips for all moneys so paid in are then sent by the Official Assignee to the Treasury. The title of the account is "Colonial Treasurer, Bankruptcy Estates Account." When the Official Assignee wishes to pay a dividend to a creditor in any particular bankruptcy he calls upon the Colonial Treasurer for a cheque for the amount required; the Colonial Treasurer issues and signs a cheque on the Bankruptcy Estates Account in favour of the creditor; if the amount is over $10,000 the cheque is countersigned by the Colonial Secretary; the cheque is then passed on to the Official Assignee who countersigns it as required by Bankruptcy Rule 193(1) and hands it to the creditor. This procedure was followed in the present case, but, as I have already stated, the cheque was handed not to the creditor but to a person who had no right or title to receive it.

In the circumstances outlined above it is contended on behalf of the Appellant that he is entitled to maintain this action on the following grounds:—

(1) That he is the drawer of the cheque or a person in the position of a drawer and is therefore the true mercantile owner of the cheque;

(2) That, alternatively, he is the legal owner of the cheque for the time being.

As to the first of these contentions I agree with the view taken by the learned trial Judge that the Official Assignee is not the drawer of the cheque in question. The cheque is drawn on an account in the Hongkong and Shanghai Banking Corporation the title of which is, as I have said, "Colonial Treasurer, Bankruptcy Estates Account." It is true that Bankruptcy Rule 193(1) requires that all cheques drawn on the Bankruptcy Estates Account shall be countersigned by the Official Assignee, and it is argued from this that the Official Assignee's signature completes the mandate to the Bank to pay out the money and that therefore he is in fact the drawer. I cannot accept this view. In my opinion the requirement of Rule 193(1) as to the countersignature of the Official Assignee on cheques is merely in the nature of an administrative check or safeguard in connection with bankruptcy payments and does not confer on the Official Assignee any right to draw cheques on the Bankruptcy Estates Account. So far as the Bank is concerned the only person entitled to draw on that account is the actual customer who is the Colonial Treasurer.

I also agree with the finding of the learned trial Judge that the Official Assignee is not "in

the position of a drawer" as regards this cheque. The Appellant's contention in support of the proposition that he is in the position of a drawer appears to be based on an alleged relation of principal and agent existing between the Official Assignee and the Colonial Treasurer. I am not satisfied that any such relation exists. When the Official Assignee calls upon the Colonial Treasurer for a cheque to enable him to pay a dividend the Colonial Treasurer is required by Bankruptcy Rule 193(1) to provide him with the necessary funds, but so far as the actual *drawing* of the cheque is concerned the Colonial Treasurer draws it on an account standing in his own name in the Bank. The Colonial Treasurer alone is the customer of the Bank and in operating the account he does not in any sense act as agent of the Official Assignee.

I am therefore of opinion that the Official Assignee is neither the drawer of this cheque nor a person in the position of a drawer, and, therefore, since it is not suggested that he is the payee, indorser, holder or bearer, he is not the true mercantile owner of the cheque.

The Appellant's alternative contention mentioned above is based on the proposition that the cheque is a chattel and that by virtue of his possession of and property in that chattel he is the legal owner of it for the time being. He contends therefore that even if he is not the true owner of the cheque in the mercantile sense he is still entitled to maintain the present action. In support of this contention he relies on the following facts: the property of the bankrupt is, under section 24(4) of the Ordinance, vested in the Official Assignee; the Official Assignee is in lawful possession of a cheque representing portion of the property of that bankrupt; while in possession the cheque is taken from him by fraud; the cheque is duly cashed, with the result that the property of the bankrupt has suffered a loss to the extent of the face value of the cheque.

In my view the contention of the Appellant on this point is well-founded. It is clear that a cheque is a chattel, it is not denied that the Official Assignee was in lawful possession of this cheque; inasmuch as the cheque represented portion of the property of a bankrupt the Official Assignee had, in my opinion, a definite property in it, the cheque was obtained from him by fraud; and the loss sustained as the result of the wrongful taking of the cheque appears to me clearly to fall upon the property of the bankrupt. It seems to me that on these facts the right to possession of and the property in this cheque are still vested in the Official Assignee and that he is therefore entitled to maintain an action for conversion against any person who, however innocently, has obtained possession of the cheque and has disposed of the proceeds thereof, whether for his own benefit or that of any other person (*vide* the observation of Lord Chelmsford in *Hollins* v. *Fowler*, L.R. 7 H. L. at page 795 which is quoted with apparent approval by Scrutton, L.J. in *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, 1924, 1 K.B. at page 791). Indeed the case of the *Winkfield*, 1902, Probate 42, at pages 55 and 60, and the cases there cited, would appear to be adequate authority for the proposition that mere possession of a chattel affords a good title as against a wrongdoer.

It is argued on behalf of the Respondents that these authorities apply only to ordinary chattels and that in the case of a fictitious chattel, such as a bill of exchange, the law to be applied is the law governing negotiable instruments: in effect, that only the true mercantile owner (namely, the drawer, payee, indorser, holder or bearer) can sue on a cheque. I am unable to accept this argument. In the first place, in the particular circumstances of the present case, I can see no material distinction between this cheque and an ordinary chattel, and in the second place I can find nothing in the law relating to negotiable instruments (meaning, presumably, the Bills of Exchange Act, 1882) which precludes the Official Assignee from bringing the present action. The law relating to bills, notes and cheques was codified by the Bills of Exchange Act, and that Act *inter alia* confers certain statutory protection on bankers, but it does not take away any rights or remedies which existed at common law prior to its enactment. Indeed section 97(2) of the Act expressly provides that the rules of common law, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to bills of exchange promissory notes, and cheques.

In the circumstances and for the reasons which I have indicated I am of opinion that the Official Assignee is entitled to maintain an action for conversion of this cheque. I would therefore allow this appeal and refer the case back to the learned trial Judge for disposal of the other issues, leaving it to his discretion to hear any further evidence or argument which may be offered.

I desire to make it clear that it is not to be understood from anything I may have said in the course of this Judgment that I have formed any opinion whatever as to the merits of this case. I have concerned myself only with the question whether, in the circumstances before us, the Official Assignee had any right or title to bring any action.

THOMAS, C. J. (F.M.S.)—At the hearing of this suit it was held that the Official Assignee was not the true owner of the cheque which was the subject matter of the suit, and that therefore he had no right to bring the suit.

The suit was accordingly dismissed, and the other matters arising in the suit were not determined.

When a debtor is adjudged bankrupt, his property becomes divisible amongst the creditors, and vests in the Official Assignee (Ord: 44, section 24(4)). The Official Assignee is in the position of a Receiver (0.44, sections 53 and 71). He must pay moneys received by him on account of estates in bankruptcy into Court to the credit of the bankruptcy account (0.44, section 73), that account being kept by the Treasury (0.44 section 73).

Bankruptcy Rule 193 provides for the payment of dividends by cheques to order drawn on the Bankruptcy Estates Account signed by the Colonial Treasurer and countersigned by the Official Assignee, and for the issue of such cheques to the Official Assignee by the Colonial Treasurer on his application.

The cheque in respect of which this suit was brought was drawn in accordance with the regular procedure, and issued to the Official Assignee. Thereby he obtained a cheque for the purpose of paying a dividend. His position would be similar to that of a person who, having to pay a sum of money and having no banking account of his own, obtains from some other person a cheque for this purpose, his own name not appearing on the cheque either as a drawer, payee or endorsee. The question then arises whether he has any right to bring a suit in his own name with regard to that cheque in the event of its being taken from his possession and dealt with improperly. There may of course be a defence such as negligence, but I wish to confine myself entirely to the question of his right to maintain his suit.

The Bills of Exchange Act deals only with transfer by negotiation, and leaves untouched the rules of general law which regulate the transmission of bills by act of law and the transfer of choses in action or chattels according to the general law—(see Chalmers' Bills of Exchange, 10th edition, page 150).

Section 97(2) of the Bills of Exchange Act provides that:—

> "the rules of Common Law, including the law merchant save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and cheques."

Chalmers at page 154 says:—

> "Rule 6. A bill may be transferred by assignment or sale, subject to the same conditions that would be requisite in the case of an ordinary chose in action";

and a little lower down:—

> "A bill is a chattel, therefore it may be transferred as a chattel. A bill is a chose in action; therefore it may be assigned as a chose in action. It is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment according to general law."

In the case of *Brice* v. *Bannister*, 1878. 3 Q.B.D. 569, Brett L.J. said in the course of his judgment:—

> "Suppose a man writes upon paper 'I promise to pay A.B. the sum of £100 on demand,' the document, not being payable to bearer, or to order, is not a promissory note, assignable or negotiable by statute or law merchant. Has any Court of Equity ever held that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that is directly contrary to all practice, custom and law, and shows that the doctrine is not to be allowed to control or hamper ordinary business transactions."

The answer would seem to depend on whether the transfer or assignment was intended to be a negotiation of the note. If the transaction amounts to a negotiation then the Bills of Exchange Act would no doubt apply. But in the present case there was no question of negotiation as between the Treasurer and the Official Assignee.

The Official Assignee had obtained a document the cost of which would be charged to the Bankruptcy Estates Account the moneys in which represented properties the ownership of which vested in him. He was not obliged to negotiate that document. He might destroy it if he wished. But once it was negotiated it would be the Bankruptcy Estates Account which would have to pay, and in the event of the instrument being improperly negotiated, it would be the Bankruptcy Estates Account which would have to suffer.

But prior to negotiation it could seemingly be sold or assigned, and it was in fact transferred by the Treasurer to the Official Assignee, for that in my opinion is the meaning of the word 'Issued,' (see Halsbury 2nd edition Vol. IV page 422 note (*q*) "But the bill itself may be assigned"—(*Re Barrington*, 1804, 2 Sch. & Lef. 112, 9 Revised Reports, page 61). The head-note reads as follows:—

> "B. hands over a negotiable note for valuable consideration to G. not endorsing it, but giving a written acknowledgment on a separate paper, to be accountable for the note to G. G. endorses the note, which together with the written acknowledgment comes into the hands of M. for valuable consideration. B. and the several parties to the note, become bankrupt. M. cannot prove the note against the estate of B. the written acknowledgment not being assignable; but is entitled to have the amount

made an item in the account between B. and G. and to stand in the place of the latter."

But the transfer in this case is irrespective of any negotiability dealt with in the Act or of anything relating to negotiability; it is a transfer of the thing itself with the right to keep it or issue it and to receive protection against any person improperly taking it or using it. In my opinion the person who has the right to enforce these rights is the transferee himself. He may as a measure of precaution join other persons either as plaintiffs or defendants, but if he chooses to bring the suit in his own name, I see nothing to prevent him from maintaining the suit.

I am, therefore, of the opinion that this suit was properly brought by the Official Assignee, and that this appeal should be allowed.

The order of Mills, J. dismissing the suit must be set aside and the case be sent back for the determination of the other matters raised at the hearing.

GERAHTY, J.—It is unnecessary for me to dwell upon the circumstances in which the cheque in question came into the hands of the Official Assignee, since that aspect of the case has been fully and clearly dealt with in the judgment of the learned President.

I will therefore confine myself to the sole issue before this Court, namely, whether in the particular circumstances of this case the Official Assignee has a cause of action against the defendants?

It has been contended that in-as-much-as the Official Assignee is not a party to the cheque in the mercantile sense he cannot be the true owner of the cheque and that consequently he cannot sue upon it for conversion.

It is obvious, I think, that the Official Assignee is neither the payee or an endorser or the holder or bearer of the cheque, and the learned trial judge has held that he is not the drawer of the cheque and that consequently he is not the true owner of the cheque and cannot bring this suit upon it.

I agree with the learned trial Judge that the Official Assignee is not the owner of the cheque in the mercantile sense, but I differ from him in holding that because the Official Assignee is not the true owner in the mercantile sense he has had no cause of action upon the cheque against the defendants.

It has been contended in this Court, though only indirectly in the Court below, that the Official Assignee is the owner of the cheque in as much as he not only had possession of it but also property in it, in that the cheque represents funds of a bankrupt, which by section 24(4) of the Bankruptcy Ordinance had vested in the Official Assignee, and which was being utilised by him in payment of a dividend in accordance with Rule 193(1) of the Bankruptcy Rules.

In my view this contention must be correct.

A cheque, like a bill of exchange, is a chattel, see *per* Williams, L. J. in *Embiricos* v. *Anglo-Austrian Bank*, (1905) 1 K.B. at p. 683 and *Chalmers' Bills of Exchange*, 9th Edition pp: 89, 154 and 283. There is ample authority to show that mere possession of a chattel is, as against a stranger, a sufficient title to support an action for conversion and the defendant cannot plead the *jus tertii* unless he defends on behalf of the true owner or has already made satisfaction to him. See *per* Lord Campbell in *Jeffries* v. *Great Western Railway Co.*, (1856) 5 E.& B p. 805, and *Salmond on the Law of Torts*, 7th Ed. p. 403.

In the present case it is to be observed that the Official Assignee had not only possession for the time being of the cheque which had been transmitted to him by the Colonial Treasurer to complete by adding his counter-signature before issue, but he also had a direct interest in it in his capacity as trustee of the bankrupt's estate the funds of which the cheque represented and which have sustained loss resulting from its conversion.

Although it may be argued that this cheque is a chattel merely in the sense that it is a piece of paper the possession of which the plaintiff has been deprived, yet in the particular circumstances of this case, it seems to me that by virtue of his position as Official Assignee he has been deprived not only of the cheque in that sense but of the value it represents to the bankrupt's estate which by law has been vested in him and for which he is accountable.

For these reasons and without expressing any view on the merits of the case, I am of opinion that the Official Assignee has a cause of action for conversion against the defendants.

In arriving at this conclusion I have had in mind that the expression "true owner" as employed in Section 82 of the Bills of Exchange Act, 1882, is not defined in that Act and I have been unable to find any authority for holding that the true owner of a cheque must necessarily be a party to the cheque in the mercantile sense or for holding that the protection afforded to a collecting banker by that section is limited to such an owner.

I am accordingly of opinion that this appeal should be allowed and that the case should be referred back to the learned trial judge for his decision on the remaining issues.

Appeal allowed.

Solicitors for the Appellant—*Rodyk & Davidson.*

Solicitors for the Respondents—*Chan & Eber.*